No. 04-63

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

V.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY MEMORANDUM

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I. INTRODUCTION.

The Respondents, in their opposing brief,[1] have attempted to recharacterize the Petitioners' claims as a simple, local land use dispute not worthy of constitutional protection and, in the course of their brief, misconstrued the holding of *Sacramento v. Lewis* and the Court's recent opinion in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*. Respondents, through their pleadings and their opposition, have attempted to minimize their illegal actions as "land use policy" when, in fact, their actions in denying Petitioners the use and enjoyment of their property raise far-reaching questions of federal constitutional law and substantive due process that never have been addressed by this Court.

II. LEGAL ANALYSIS.

A. Respondents Misconstrue the Holdings in *County of Sacramento v. Lewis* and in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation.*

Respondents assert in their Brief in Opposition to Certiorari that this Court's decisions in *County of Sacramento v. Lewis*, 523 U.S. 833 (1988), and *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), support the Third Circuit's holding below that where a municipal official's decision is related in any way to a rational land use goal there can be no due process violation. Respondents' arguments are based,

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[1] Respondents Jackson Township, W. Thomas Wilson, Michael Yoder, Ralph Weiler, David Van Dommelen, Barry Parks and Ann Wirth submitted a Brief in Opposition to Certiorari. Respondent Larry Newton, apparently, has elected not to file a Brief in Opposition to Certiorari.

however, on an incorrect reading of *Sacramento v. Lewis* and an apparent misunderstanding of the materially distinguishable facts of *Cuyahoga Falls*.

As more fully set forth in Petitioners' main brief, the Third Circuit's holding is not a natural outgrowth of this Court's holding in *Sacramento v. Lewis*. Indeed, the Third Circuit's and the District Court's analysis disregards the critical "totality of the circumstances" test required by *Sacramento v. Lewis*. *See* 523 U.S. at 846-47 and 850; Pet. for Cert. at 12-14. The Court in *Sacramento v. Lewis* clearly stated:

> Rules of due process are not [...] subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. ... Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Sacramento v. Lewis at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Notwithstanding this clear directive, the Third Circuit and the District Court did not apply the "totality" of the circumstances analysis, but instead applied a wholly

unrelated (and brand new) rule of law: "unless the defendants' actions were '*completely unrelated in any way to a rational land use goal*,' there is no violation" of substantive due process. (App. 3a) (emphasis added). In other words, the Third Circuit's analysis is that, regardless of any other evidence to the contrary, where the municipal official articulates any facially rational basis for his actions, there can be no violation of substantive due process. This result is plainly contrary to the rule of *Sacramento v. Lewis*, and the entire jurisprudence of this Court, that the courts must consider and evaluate differently those situations in which executive officials have the luxury of time to make unhurried judgments uncomplicated by the demands of competing obligations (for example, land development applications), and that in those situations, deliberate indifference of the state actor can rise to the level of conscience-shocking behavior. *See Sacramento v. Lewis* at 852-53.[2]

Respondents also assert that this Court's decision last term in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), somehow validates the Respondents' arbitrary denial of the Petitioners' right to use and enjoy their property. In *Cuyahoga Falls*, a nonprofit corporation sought to develop a low-income housing development. The development met with substantial public opposition that appeared to be based, at least in part, on racial discrimination. The city council approved the development plans in spite of the opposition, but then refused to issue

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[2] Respondents make the curious assertion that, "In *Lewis*, this Honorable Court determined that unless the Respondents' actions were 'completely unrelated in any way to a rational land use goal,' there is no substantive due process violation. *See Lewis*, 523 U.S. at 846." (Resps.' Br. Opp. Cert. at 17). Of course, this Court made no such determination in *Sacramento v. Lewis*, and Respondents' accompanying conclusion that the lower courts' decisions, therefore, are not inconsistent with *Sacramento v. Lewis* is misguided.

building permits because the opponents to the development filed a petition requiring the development approval to be submitted to public referendum under the city charter. *See Cuyahoga Falls*, 538 U.S. at 191-92. The city charter further provided that an ordinance challenged by petition shall not go into effect until approved by the voters. *Id.* at 192.

Buckeye filed suit, asserting violation of the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act. This Court, in addressing the matter, concluded that Buckeye failed to state either an Equal Protection[3] or Due Process Claim. As to the Due Process portion of the analysis, the Court concluded that the city's decision not to issue the permits after the referendum petition had been filed could not rise to the level of arbitrary conduct because the city charter specifically directed that an ordinance challenged by petition shall not go into effect until approved by a majority of voters. *Id.* at 198-99. In other words, there was no due process violation because it cannot be an arbitrary act to do that which is prescribed by an otherwise valid law.

By contrast, the actions taken by the Respondents in this case clearly were *not authorized* by law. Respondents imposed a moratorium on all subdivisions and land development (in anticipation of Petitioners' forthcoming application for subdivision approval) despite the absence of any subdivision or land development ordinance – an absolute

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[3] The bulk of the Court's opinion in *Cuyahoga Falls* is dedicated to analysis of the equal protection claim. Petitioners here have not pleaded claims arising under the Equal Protection Clause, and that analysis is largely immaterial to Petitioners' claims. Respondents, on the other hand, continue to confuse the equal protection standards with due process standards, repeatedly emphasizing that Petitioners were not subject to disparate treatment by Respondents. (*See* Resps.' Br. Opp. Cert. at 15 n.7 and 21).

prerequisite for any land regulation – and despite the fact that there is no authority in Pennsylvania law for the imposition of moratoria in the first instance. (App. 26a n.10). Moreover, the Record makes abundantly clear that many of the actions of the Respondents were taken in bad faith and for reasons of personal animus.[4] Thus, while the proper determination of the substantive due process claim in *Cuyahoga Falls* appears to be quite simply reached, the facts in this case are so distinguishable as to make Respondents' reliance thereon unpersuasive, and require this Court's guidance for the proper application of the shocks the conscience standard to property rights cases.

B. Respondents' Have Continued to Mischaracterize and Denigrate the Nature of the Petitioners' Claims.

Throughout this entire litigation, Respondents have mischaracterized the nature and basis of the Petitioners' claims in their efforts to avoid constitutional review of their deprivation of the Petitioners' right to use and enjoy their property. Respondents continually characterize Petitioners' claims as an ordinary "land use dispute," attempting to draw parallels between this case and cases involving purely local matters such as zoning variances, rights of way, and similar issues of local concern. This case, however, presents much more significant issues that do, in fact, rise to the level of federal constitutional concern. In a nutshell, this case presents the question of whether local municipal officials can abuse their official positions to prevent land development for no reason other than the fact that they do not like the property owner and do not want him as a neighbor. As even the First

[4] Petitioners will not repeat here the long list of undisputed facts relating to the Respondents acts, but refer the Court to pages three through five of their Petition for Writ of Certiorari.

Circuit stated: "We have thus observed a marked difference between the inevitable misjudgments, wrong-headedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant, and extreme actions of those who would be parochial potentates." *Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000).[5]

The Respondents mischaracterization of the Petitioners' claims goes much further than even the mild disparagement noted above. Respondents go so far as to declare boldly that "Petitioners presented no evidence to support their allegation that the SALDO [subdivision and land development ordinance] was adopted to prevent the Corneals from developing their property" and, therefore, summary judgment was proper. (Resps.' Br. Opp. Cert. at 13). The pleadings and papers filed in this case affirm the Respondents' brave assertion – the Petitioners never challenged the right of the Township to impose an effective, lawfully enacted subdivision ordinance, nor could they. Rather, Petitioners challenged the numerous unlawful acts undertaken by the Respondents *in the absence of a valid subdivision ordinance* and for the sole purpose of interfering with the Petitioners' right to use and enjoy their property, and Respondents' semantics cannot undermine the constitutional significance of Petitioners' claims.

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[5] Notwithstanding this observation, the First Circuit rejected the plaintiffs' substantive due process claims in *Baker v. Coxe*, thus maintaining its policy of rejecting all substantive due process claims in land use cases. *See Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) ("We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities....").

C. Respondents' Brief Emphasizes the Need for Guidance from This Court in Applying Substantive Due Process Standards to Land Use Cases.

Respondents argue in their opposition brief that there is no inconsistency among the Circuits in their application of the "shocks the conscience" standard in substantive due process cases involving land use. In support, Respondents recite the holdings of the same cases discussed by Petitioners in Part B of the Petition (Pet. for Cert. at 17-23). Respondents differ only in their conclusion: Respondents assert that, although each court describes the standard differently, the application is uniform – rejection of substantive due process protection of property interests – and, therefore, there is no issue for resolution by this Court.

Respondents' conclusion, however, demonstrates the precise reason that guidance by the Court is necessary. The Circuit Courts all have expressed their policy-based reluctance to allow landowners to seek redress for deprivation of property rights through substantive due process. *See, e.g.*, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) ("application of the 'shocks the conscience' standard in this context also prevents us from being cast in the role of a 'zoning board of appeals.'"); *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (same). Certainly, sound policy requires that run-of-the-mill zoning appeals should not be permitted to be re-cast as substantive due process claims, but the Circuit Courts' tenacious adherence to a blanket policy of excluding real property rights from substantive due process protection is contrary to

the text and spirit of the Fourteenth Amendment[6] and to the very foundations of our Nation.

Guidance from this Court, therefore, is critical to define the proper application of the "shocks the conscience" standard to those cases which implicate the protections of the Fourteenth Amendment from arbitrary acts of local government officials in relation to a landowner's right to use and enjoy his or her property. In the absence of such guidance, the Circuit Courts will continue to utilize the current inconsistent formulations and analyses to justify an overbroad, policy-based exclusion of property rights from substantive due process protection.

D. Respondents' Misapprehend the Distinction Between the Legal Definition of a Constitutional Right and the Factual Determination of a Violation Thereof.

Respondents argue that the Third Circuit's opinion is in accord with this Court's decisions relating to the role of the jury in substantive due process cases because the question of whether a plaintiff has asserted a violation of a constitutional right is a question of law and, therefore, "it is for the Court to determine whether the Corneals' claim constitutes a substantive due process violation under the applicable standard in the first instance." (Resps.' Br. in Opp. Cert. at 23). Respondents' synopsis of the lower courts' analysis is accurate, and demonstrates again why review by this Court is necessary: if this Court were to accept Respondents' formulation, then there would be no role for the jury to play in any substantive due process claim, because judge already would have made a binding

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[6] "No State shall ... deprive any person of life, liberty, or property, without due process of law". U.S. Const., amend. XIV, § 1.

determination *before any genuinely disputed facts are weighed by a jury* that (1) a fundamental right is implicated, (2) that the defendant, acting under color of state law, violated that right, and (3) that the defendant's conduct rises to the level of shocking to the contemporary conscience.

Respondents' recitation of the Third Circuit's formulation of the role of the jury in substantive due process cases is plainly at odds with the decisions of this Court. It is beyond dispute that questions of fact must be determined by the fact-finder, i.e., the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This Court further has held that the question of whether the contested government action substantially advances a legitimate governmental interest is a mixed question of law and fact, and, in context, the questions of "advancement" the ultimate question of intent, are undeniably for the jury. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). Thus, the question of the existence of a legitimate governmental interest is for the jury, and it is only after a finding of a legitimate government interest that the court should make the legal determination of whether the actions of the governmental actor are rationally related to that legitimate goal. *See id.*; *see also Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (court should submit to the jury question of whether asserted state interest is rationally related to the complained of actions or is mere pretext); *Estate of Smith v. Marasco*, 318 F.3d 497, 510 (3d Cir. 2003) (court's conclusion that element of due process claim could not be proven because officers used legitimate tactics usurps the role of the jury where plaintiff presented evidence disputing officers' motives and tactics).

Here, the Petitioners presented the District Court with substantial evidence raising issues of the motivation, intent and credibility of the Respondents, and the District Court

expressly acknowledged that it could not determine from the facts of record "whether the Defendants blocked the Corneals' land development plans as a matter of land use policy or because they simply did not like Mr. Corneal and wanted to keep such a 'trouble making yuppie' from erecting a home in the Township." (App. 51a). Nevertheless, on the renewed motion for summary judgment, the District Court adopted the approach enunciated by the Respondents in their Brief in Opposition, made its own determinations as to the credibility of the Respondents and whether the Respondents' undisputed acts (and disputed acts) were motivated by rational land use concerns and whether those acts could "shock the contemporary conscience." This is clearly a usurpation of the role of the jury, and the Third Circuit's sanction of that procedure is manifestly violative of this Court's holdings in *Del Monte Dunes* and *Matthews v. Lucas*. Accordingly, the Court should grant Certiorari to clarify the role of the jury in deciding substantive due process cases.

III. CONCLUSION

The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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